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*TWENTY YEARS AFTER TAMPERE AND TEN YEARS SINCE THE
LISBON TREATY THE EUROPEAN AREA OF FREEDOM SECURITY
AND JUSTICE HAS LOST ITS COMPASS?*

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1. Introduction.

Almost a decade ago the Lisbon Treaty came into force. It promised great advances for EU democracy, particularly in the policy areas that collectively come under the Area of Freedom, Security, and Justice (FSJA)¹.

Although the EU already had significant experience with parliamentary involvement in legislating, it had been confined mostly to technocratic, common market issues, not those over which citizens have typically paid most attention to law and order, migration, and fundamental rights. Since the Single European Act (1986), the Maastricht Treaty (1993), the Amsterdam Treaty (1997) and the Nice Treaty the EU has had an increasingly im-

¹ According to the European Commission “*The three notions of freedom, security and justice are closely interlinked. Freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system of justice in which all Union citizens and residents can have confidence. These three inseparable concepts have one common denominator - people - and one cannot be achieved in full without the other two. Maintaining the right balance between them must be the guiding thread for Union action*”, COM(1998)0459. This document may be consulted here: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1998:0459:FIN:EN:PDF>.

portant role to play also in these areas. In a first phase, until the Amsterdam Treaty, the EU framework was mostly intergovernmental (the so-called “third Pillar”) without parliamentary and judicial control at EU level. Then, a first block of competencies dealing with borders, migration, asylum and judicial cooperation in civil matters was transferred to the “community” regime by abandoning the unanimity rule in the Council, associating the EP in co-decision and empowering the Court of Justice.

As a result of the Lisbon Treaty, police and judicial cooperation on criminal matters, which was the last policy covered by the intergovernmental method, was also brought under the “community” regime. Moreover, legislating in the fundamental rights arena was given a boost by the binding effect given to the Charter of Fundamental Rights, which makes a clear reference in its preamble to the rights of the individuals and to the area of freedom, security and justice².

Putting into practice the Treaty’s promise of democracy never promised to be easy. But as is widely known, the past years have not been normal times. Apart from the Eurozone crisis, the jihadi terrorist attacks in Paris, Berlin, and Brussels, as well as the Syrian refugee crisis, have tested the policies at the core of the FSJA.

This chapter examines how the EU’s practice of democracy in FSJA has evolved in the turbulent years since the Lisbon Treaty entered into force.

2. What happened in law with the entry into force of the Lisbon Treaty.

Raising from the ashes of the Constitutional Treaty whose ratification was blocked in mid-2005 by two negative referenda in France (May) and in the Netherlands (June), the Lisbon Treaty was signed in Lisbon on 13 December 2007 and entered into force on 1 December 2009, notwithstanding the resistance of some Member States³. Even if, unlike the failed Con-

² See the Preamble to the Charter, according to which the EU “... *places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice*”.

³ Suffice it to recall that after the two negative French and Dutch referendums on the Constitutional Treaty in 2005, the Lisbon Treaty was also rejected by a referendum in 2008 in Ireland and the result was overturned a year later only after a series of concessions. In Germany the German President, Horst Kohler, suspended his signature of the instrument of ratification in order to wait until the adoption of a very thorough judgment of the Bundesverfassungsgericht, which ruled that the Lisbon Treaty was compatible with the German

stitutional Treaty, it does not repeal or replace the texts of the pre-existing Treaties and from a formal point of view should be considered only an amendment to those treaties, from a substantive point of view it improves quite substantially the pre-existing legal situation by taking account of several of the advances foreseen by the Constitutional Treaty⁴ notably for FSJA related policies.

In this first part, special attention is paid to four aspects: (a) the rising importance of the EU founding values as a precondition of mutual trust notably in the FSJA; (b) how the FSJA policies should not only protect but promote fundamental rights; (c) how the new EU single personality impacts on the FSJA and could solve some former institutional problems, and (d) the case of the opt-out countries and of Schengen cooperation.

2.1. The protection of EU founding values as pre-condition for mutual trust.

Transforming a market-oriented organization into a more ambitious political entity where sovereignty could be shared between the Member States and the new organisation required a “constitutional homogeneity”⁵ which

Basic Law once the powers of the Bundestag and of the Bundesrat were strengthened and the latter were able to express their position before the *passerelle*, flexibility or other clauses of the Treaty could be used. A law of consent requiring a 2/3rds majority in the Bundestag (and a 2/3rds majority in the Bundesrat where matters falling within its competence are concerned) is now required.

But the main difficulties were raised by the Czech Republic whose President Klaus on 9 October 2009 made the completion of the ratification process of the Lisbon Treaty conditional upon giving a guarantee that an opt-out in respect of the application of the Charter of Fundamental Rights of the EU would be granted to the Czech Republic similar to that which Poland and the United Kingdom had been granted (Protocol no. 30).

⁴ It is worth recalling that the Constitutional Treaty was ratified by 18 Member States and this would have been frustrated if the new Treaty had been less ambitious with regard to the substance.

⁵ This “Constitutional homogeneity” should not be a threat to the institutional identity of each EU Member State since Article 4(2) provides that “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government” and the right balance between these two conditions of Constitutional homogeneity and National identity has to be found in the relationship which has taken shape between the Court of Justice of the EU and the national Constitutional Courts on the issue of “limits” and “counter-limits”. As James Madison observes in *Le Fédéraliste*, “[p]lus

can prevent endless fights on the main aim of the organisation and on which the mutual trust between the Member States and with the EU institutions can be built by preserving each State's own Constitutional "identity". Even if the first declarations defining the EU identity dates back to the beginning of the 1970s⁶ and a first reference to "common principles" was already in the Maastricht Treaty, it is with the Lisbon Treaty that EU "values" have become the core of the EU identity: *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"* (Art. 2 TEU).

These "values" also shape the EU's missions as stated by Art. 3 TEU, according to which *"The Union's aim is to promote peace, its values and the well-being of its peoples"*. Quite logically, promoting these values should also be a common endeavour of EU Member States both before acceding the EU (Art. 49 TEU) as well as, thereafter, in order to maintain a full membership (Art. 7 TEU).

Among these founding values, respect for the rule of law is a key element of the relationship between the EU and its Member States and a pre-condition to preserve the mutual trust and solidarity between the EU Member States. As clarified by the CJEU⁷, *"The case-law of the Court of*

cette Union est intime et plus chaque membre a d'intérêt aux institutions politiques de tous les autres; plus il a le droit d'exiger que les formes de gouvernement sous lesquelles le contrat a été conclu soient maintenues... Des gouvernements de principes et de formes différentes sont moins propres à former une coalition fédérale quelconque, que des gouvernements de nature analogue" (Hamilton, Jay et Madison, 1902, 359).

⁶ The Copenhagen Declaration of European Identity (13 December 1973 accessible here: https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf).

⁷ See paras 98 and 99 of the judgment of the General Court of 15 September 2016 in Case T-348/14, *Oleksandr Viktorovych Yanukovych*: "(98) In that regard, it must be recalled that respect for the rule of law is one of the primary values on which the European Union is founded, as is stated in Article 2 TEU, and in the preambles of the EU Treaty and of the Charter of Fundamental Rights. Respect for the rule of law constitutes, moreover, a prerequisite of accession to the European Union, pursuant to Article 49 TEU. The concept of the rule of law is also enshrined in the preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. (99) The case-law of the Court of Justice and of the European Court of Human Rights, and the work of the Council of Europe, by means of the European Commission for Democracy through Law, provide a non-ex-

Justice and of the European Court of Human Rights, and the work of the Council of Europe, by means of the European Commission for Democracy through Law, provide a non-exhaustive list of principles and standards which may fall within the concept of the rule of law. That list includes: the principles of legality, legal certainty and the prohibition on arbitrary exercise of power by the executive; independent and impartial courts; effective judicial review, extending to respect for fundamental rights, and equality before the law (see, in that regard, the rule of law checklist adopted by the European Commission for Democracy through Law at its 106th Plenary Session (Venice, 11-12 March 2016)).

According to the Luxembourg Court, the rule of law⁸ “... is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law” (CJEU Opinion 2/13, EU:C:2014:2454, para. 191).

To preserve the EU founding values a political mechanism had already been put in place by the Maastricht and Amsterdam Treaties giving the possibility to the European Council and to the Council in case of violations of these values by a Member State “... to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member

haustive list of principles and standards which may fall within the concept of the rule of law. That list includes: the principles of legality, legal certainty and the prohibition on arbitrary exercise of power by the executive; independent and impartial courts; effective judicial review, extending to respect for fundamental rights, and equality before the law (see, in that regard, the rule of law checklist adopted by the European Commission for Democracy through Law at its 106th Plenary Session (Venice, 11-12 March 2016). Further, in the context of European Union external action, a number of legal instruments include references to the fight against corruption as a principle within the scope of the concept of the rule of law (see, for example, Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument (OJ 2006 L 310, p. 1)).

⁸ See CJEU Opinion 2/13 “168. This (EU) legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected”.

State in the Council” (art 7.3 TEU)⁹. The main objective of a possible suspension of the voting rights is a sort of self-defence of the EU against one or more Members which might jeopardise the adoption of measures required by the Treaties¹⁰.

As a complement to the Article 7 TEU procedure the Commission announced in its 2018 communication ‘A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020’ and on May 2 2018 it proposed¹¹ a regulation on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States. According to the Commission “*The Union is a community of law and its values constitute the very basis of its existence. They permeate its entire legal and institutional structure and all its policies and programmes. Respect for these values must therefore be ensured throughout all Union policies. This includes the EU budget, where respect for fundamental values is an essential precondition for sound financial management and effective EU funding. Respect for the rule of law is important for European citizens, as well as for business initiatives, innovation and investment. The European economy flourishes most where the legal and institutional framework adheres fully to the common values of the Union*”¹².

2.2. Towards an integrated FSJA and a stronger protection of fundamental rights at EU level.

The second main EU objective listed by Article 3(2) TEU after the protection and promotion of EU values is the transformation of the EU into an Area of Freedom, Security and Justice Area (FSJA).

According to it: “*The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to*

⁹ This procedure is described in art. 7 TEU and 354 TFEU.

¹⁰ Immediately after the entry into force of the Amsterdam Treaty unanimity was required for the adoption of measures dealing with anti-discrimination policies and the Member States even without triggering the art. 7 procedure decided to ostracize from part of their works the government of Austria because of the participation as a minister of Mr Haider a representative of a political party whose programs were considered quasi-racist.

¹¹ COM(2018) 324 final of 2 May 2018.

¹² On this proposal currently pending before the Council see the Court of Auditors Opinion No 1/2018).

external border controls, asylum, immigration and the prevention and combating of crime” (art 3(2) TEU).

At first sight this formula codifies the same objectives which were already present in the Amsterdam Treaty and even before in Schengen cooperation.

However, after Lisbon the role of the EU is upgraded from an area of basic cooperation between Member States to a public integrated supranational space where the centre of gravity of these policies is progressively transferred from the Member States to the EU level.

Whereas before Lisbon in these domains the EU was only a space of coexistence of the Member States framed by “minimum” rules, after Lisbon the Treaty foresees the establishment in several cases of true “common EU policies” where the supranational and national level should be “integrated”¹³, solidarity should be a general principle (Art. 80 TFEU) and even when in judicial cooperation in criminal matters reference is made to “minimum rules” (Arts 82 and 83 TFEU), this is already a sufficient basis for the harmonisation of national law¹⁴.

Moreover, the fact that after Lisbon all the FSJA policies have been transferred from the intergovernmental to the ordinary regime makes it easier to synergise these policies with other EU policies now listed in other sections of the Treaties, such as the ones dealing with EU citizenship (Art. 20 TEU), the freedom of movement of EU citizens (Art. 21 TEU), antidiscrimination policies (Art. 19 TEU) and measures strengthening individual self-determination, such as the protection of personal data (Art. 16 TFEU), the right of access to documents (Art 15 TFEU) and the right to good administration (Art. 298 TFEU).

In most of the EU policies directly or indirectly connected with the establishment of the FSJA there is no more need for unanimity in Council and the European Parliament, the Commission and the Court of Justice play their full role with the result that it could be possible to build wide-ranging and consistent EU policies if there is the political will to do so.

¹³ For instance on Borders the Art. 77 TFEU set the objective of the gradual introduction of an EU integrated management system for external borders and by at the same time ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders.

¹⁴ See *Melloni*, EU:C:2013:107, paragraphs 37 and 63 and *Joined Cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru*, cited above, paras 94-98. See *The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?*, <https://www.utrechtjournal.org/articles/10.5334/ujel.337/>.

Furthermore, the fact that FSJA policies are now aligned with the traditional internal market policies and framed by the general EU supranational financial policy paves the way for taking into account some essential objectives of the FSJA also when shaping social and environmental policies or when establishing a close interaction between the EU and the Member States under the so-called “European Semester”. The latter covers almost all national public policies with a financial impact and gives the Commission and the Council the opportunity to address specific recommendations to the Member States. Among such recommendations, reference has been recently made also to the question of the efficiency of the national judiciary.

That having been said, the main driving factor of the FSJA according to Article 67 TFEU is the protection of fundamental rights. This was, in theory, already the case before the Lisbon Treaty but at the time there was no clear legislative definition of the scope of these “fundamental” rights at supranational level nor clarity about what should had been done in case of conflicting rights at national and supranational level. At that time, in case of doubts about the necessity or the proportionality of a measure to be taken at EU level, only the European and/or national judges could have the final answer. The risk was that the same situation could had been assessed in a different perspective and trigger different interpretations at European and national level¹⁵.

With the adoption of the EU Charter which, under Article 6(1) TEU¹⁶, has the same legal value as the Treaties, the Lisbon Treaty has now codified the European standards of protection of fundamental rights to be followed both by the EU and national legislator as well as by the European and national judges. According to the CJEU (Opinion 2/13) respect for those fundamental rights is “... *a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU* (...)”.

Now, one point of big concern for the European Parliament since the entry into force of the Lisbon Treaty has been to verify whether EU legislation adopted before the Treaty and the Charter without taking in account the new EU priorities could still be considered legitimate.

¹⁵ Even if the Court of Justice was also open to the possibility that some EU economic freedoms could be suspended in case of conflict with exercise of some fundamental values at national level (see the *Omega* and *Schimdburger* case law).

¹⁶ Art. 6 also requires the EU to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms and keep open the door for the CJEU to further develop its jurisprudence in this area.

The main case at issue in the post-Lisbon phase has been the judgment of 8 April 2014 in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland* by which the Court of Justice by reversing a favourable judgment delivered pre-Lisbon annulled the so-called Data Retention Directive and required the EU legislator to make a strict assessment of the proportionality and necessity of measures that constitute serious restrictions on fundamental rights, “*however legitimate the objectives pursued by the EU legislature*”, as in the case of measures in the security domain.

These strict new criteria deriving from the EU Charter are binding also on the Member States when they are implementing EU law, as was stated in the *Åkerberg Fransson* ruling (C-617/10, EU:C:2013:105, paras. 17 to 21), where the Court made it clear¹⁷ that “... *Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter* (para. 21)”.

The special relationship between the Charter and most of the EU policies directly or indirectly connected with the establishment of the FSJA is confirmed also by the fact that several articles of the Charter mirror or complement the legal basis in the Treaties which are deemed to give “specific expression”¹⁸ to the EU’s founding values and fundamental rights.

The special bond between the EU Charter and the FSJA policies is apparent from the preamble of the Charter, according to which “*Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice*”.

Probably the clearest case where the individual is set at “the heart of the EU activity” is the case of the protection of personal data which appears in

¹⁷ See: [http://curia.europa.eu/juris/document/document.jsf?text=&docid=134202&pageIndex=0&doclang=en&mode=](http://curia.europa.eu/juris/document/document.jsf?text=&docid=134202&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1195356)

[lst&dir=&occ=first&part=1&cid=1195356](http://curia.europa.eu/juris/document/document.jsf?text=&docid=134202&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1195356).

¹⁸ To quote the Court of Justice in Case C-555/47 *Küçükdeveci* [2010] ECR I-365, para. 21. See E. MUIR, *The Fundamental rights implications of EU legislation: some constitutional challenges*, in *Common Market Law Review* 51, 2014, p. 223-226.

Article 8 of the Charter (together with Article 7 on protection of privacy) and in Article 16 TFEU, which empowers the EU to play a full legislative role with regard to this matter.

By requiring that each public intervention be it at EU or national level should be framed by law, necessary, proportionate and compatible with a democratic society, those articles have become the standard of reference of all measures which can have an impact on the liberties of the individual, as is the case with most measures linked with the area of Freedom, Security and Justice. It is worth recalling that the obligation of protecting personal data also covers the Member States (UK, IRL and DK) which have obtained a special status in the establishment of the FSJA as described in Title V of the TFEU.

In more general terms, the fact that EU public intervention should comply with the principles of a democratic society requires that the EU legislator should implement a consistent model of a democratic supra-national society by avoiding, for instance, the establishment of a regime of general surveillance. This is not a rhetorical question to judge from the post Lisbon CJEU jurisprudence¹⁹ and even some strong resolutions of the European Parliament denouncing an emerging regime of general surveillance²⁰.

From this perspective, the post-Lisbon emphasis on the rights of the individual can be considered a Copernican revolution as compared to the traditional EU pre-Lisbon approach where the verification of the necessity and proportionality of security measures was considered by the EU institutions and notably the Council of the European Union as being less compulsory with the result that there was a risk of overreacting to external and/or internal threats.

¹⁹ See the judgments of 8 April 2014 in Case C-293/12 *Digital Rights Ireland Ltd* ECLI:EU:C:2014:238 and of 6 October 2015 in Case C-362/14 *Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650 as well as the judgment in Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB and Tom Watson and Others* ECLI:EU:C:2016:970 of 21 December 2016 which strengthened the protection of EU citizens against public security policies which are not focused and proportionate.

²⁰ See the European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)).

2.3. Overcoming the EC-EU dualism and some of the institutional problems of the FSJA.

The content of the EU policies being under the main influence of the institutional actors associated with their definition and implementation, it is worth recalling that the main innovation of the Lisbon Treaty was to merge in a general supranational common regime also the policies which had previously been managed in accordance with an intergovernmental approach, and so abandoning the so-called three-pillar approach defined by the Maastricht Treaty.

At that time, the European Community Treaty (EC) (first pillar) covered internal-market related policies whilst the policies falling within the “intergovernmental” framework were external security (second pillar) and internal security (third pillar). The two institutional frameworks were substantially different: whereas under the Community method the EU institutions played their full role under the control of the Court of Justice, under the intergovernmental method decisions were taken unanimously by the Council, whilst the European Parliament, the Court of Justice and the Commission were given no role, or rather a very limited one.

The Lisbon Treaty overcome in principle this dualism by merging two legal personalities: first, of the European Community (as provided in Article 281 TEC) and, second, of the European Union as resulting from its treaty-making power provided for in Article 24 of the former TEU (which was used for some important EU agreements notably with the USA in the fields of judicial and police cooperation)²¹.

As a first consequence, at international level there is now a single EU legal personality and a single procedure to negotiate international agreements. Moreover most EU international agreements require the consent of the European Parliament, which in all cases should be “fully and timely informed” during all the negotiations (Art. 218(11) TFEU).

If we turn to the internal EU framework, it can be seen that the Lisbon Treaty removes the “pillar” structure notably for the so-called “third pillar”, which after Amsterdam still covered police and judicial cooperation in criminal matters. However, the former “second pillar” covering common foreign and security policy still survives as a domain of intergovernmental

²¹ Suffice it to recall the EU-US Treaties on Extradition and on judicial cooperation in Criminal Matters as well as the Executive agreements on PNR and on TFTP.

cooperation with “specific” rules and procedures (and excludes the possibility of adopting EU legislation).

After Lisbon all the policies traditionally linked with the FSJA are now subject to the general rules linked to the Community method:

1. The Lisbon Treaty gives full jurisdiction to the Court of Justice over the whole FSJ Area²².

The EU’s and Member States’ measures in this area are now subject to the powers of control by the Commission and the Court of Justice over the proper implementation by Member States of FSJA legislative acts²³, which should be considered a basic condition for the implementation of the rule of law by the EU itself.

After Lisbon the role played by the Court of Justice in the FSJA and in the interpretation of the Charter of Fundamental Rights should not be underestimated, notably with regard to data protection, transparency, asylum, borders and judicial cooperation in criminal matters.

It is worth recalling that the intervention of the Court of Justice can be more easily triggered by EU citizens and notably by the European Parliament, which has brought several cases before the Court of Justice directly or indirectly connected with the FSJA.

Quite importantly the CJEU now has full jurisdiction also with regard to international agreements covering the FSJA policies and not only a Member State, the Council or the Commission but also the European Parliament “... *may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised*” (Art. 218(11) TFEU). After Lisbon, the Opinions on the accession of the EU to the European Convention on Human Rights (2/13) and the EU-Canada Agreement on PNR also enabled

²² There is, however, an exception, provided for in Article 276 TFEU, as concerns Chapters 4 and 5 on judicial cooperation in criminal matters and police co-operation. The Court of Justice has ‘no jurisdiction to review the validity or proportionality of operations carried out by the police and other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

²³ Albeit a five years transitional period ending on 1 December 2014 was foreseen for the EU measures concerning police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Lisbon Treaty.

the Court of Justice to highlight the new post-Lisbon Constitutional framework.

2. The principle of primacy of EU law on national law is applicable also in sensitive domains such as criminal law.

Even in the sensitive fields of police cooperation and judicial cooperation in criminal law the Court of Justice has confirmed its doctrine of the primacy of EU law, notably by the *Melloni* judgment²⁴. That case was referred to the Court of Justice by the Spanish Constitutional Court, which considered on the basis of Article 53 of the EU Charter of Fundamental Rights that a Member State may apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. The CJEU answered that that interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law “...which is an essential feature of the EU legal order” so that “... rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State...” (*Melloni*, paras 58-59). It has to be noted that, recently, the CJEU followed a less drastic approach with the Italian Constitutional Court in the so-called “*Taricco I and II*” cases²⁵ where the Court of Justice recognised a wider margin of appreciation on the part of the national Constitutional Court²⁶.

Leaving aside these exceptional cases, the new EU Directives dealing with criminal law (unlike the pre-Lisbon Framework Decisions) may now also have direct effect in the Member States if their provisions are clear and precise and unconditional.

²⁴ See: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=134203&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=268781>.

²⁵ See Cases C-105/14 on September 8 2015 and C-42/17 on December 5 2017 and C. AMALFITANO, O. POLLICINO, *Two Courts, two Languages? The Taricco Saga Ends on a Wor-rying Note*, <https://verfassungsblog.de/two-courts-two-languages-the-taricco-saga-ends-on-a-worrying-note/>.

²⁶ In case M.A.S. & M.B (judgment of 5 December 2017, Case C-42/17) the Grand Chamber of the CJEU answered the question referred for a preliminary ruling by the Italian Constitutional Court concerning the connection between the internal principle of legality in criminal matters and EU law. Afterwards, the Italian Constitutional Court replied, with judgment no. 269/17, by taking a stance over the primacy of EU law. See R. DI MARCO, *The “Path Towards European Integration” of the Italian Constitutional Court: The Primacy of EU Law in the Light of the Judgment No. 269/17*, in *European Papers* 3, 2018.

3. The principle of conferral according to which the EU is competent only for the missions foreseen by the Treaties (see Art. 5 TEU) and which defines the type of the EU competence (exclusive, shared or supporting)²⁷ is also applicable to the FSJA.

The latter is considered a “shared competence” (Art. 4(2) TFEU) but the Member States shall exercise their competence to the extent that the Union has not yet exercised its competence (the so-called “pre-emption principle” enshrined in Art. 2(2) TFEU) but when the EU adopts an act it becomes a EU exclusive competence.

However this growing role of the EU is limited by a general and a specific limitation.

The general limitation is contained in Protocol 25 which makes it clear that the new EU exclusive competence covers only those elements governed by the Union act in question and not the whole area, which, as a consequence, can still be covered by the national legislation.

The FSJA “specific” limitation is stated notably in Art. 4(2) TEU according to which the EU shall respect the “... *essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State*” (Art. 4(2) TEU)²⁸.

The specific FSJA limitation is also confirmed by Article 67(1), according to which the FSJA has to be developed while respecting “*the different legal systems and traditions of the Member States*”.

However is not always self-evident how these “limitations” can be respected.

If national “internal” security is an exclusive competence of the Member States, what are the limits of the shared competence vis-à-vis EU “internal” security? How can the EU build above it an “internal” security area with specialised structures such as the Committee for Internal Security (Art. 71 TFEU) and agencies such as Europol (Art. 88 TFEU) and Eurojust (Art. 85 TFEU)?

²⁷ The Treaty has reworded some of the previous legal bases in order to better define the competences at national and supranational level.

²⁸ National security is not only an exclusive competence of the Member States but even the Court of Justice “... shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security” (Art. 276 TFEU).

Since this Member State “exclusive” competence is an exception to the general rule of “shared” responsibility, it should be interpreted restrictively and the last word will be for the EU Court of Justice.

Following a pragmatic approach, the EU Antiterrorism Coordinator has considered that the notion of “national security” in the last sentence of Art. 4(2) covers notably the activities of the national intelligence and security services whose mission is to protect the essential structure of the State and not the generic law and order domain.

As for the other aspects of internal security which fall within the shared competence, it is worth noting that the compromise found at EU level between security and freedom of the individual may not correspond to the choices made at national level and this could be the source of tensions which will be able to be resolved only with the intervention of the Court of Justice.

4. The principles of subsidiarity and proportionality.

The principles of subsidiarity and proportionality are relevant in a domain of shared responsibility with the Member States (as is the case of the FSJA policies; see also Protocols 1 and 2, which associate national parliaments with this evaluation).

According to the principle of subsidiarity, *“The Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”* (Art. 5(3) TEU).

However, to make this judgement in the case of FSJA policies is not easy because the EU should have sufficient and comparable information about the existing situation in the Member States²⁹ as well as a credible idea of what could be the impact of the measure envisaged at EU level.

In a field where EU competence is quite recent and which is still jealously protected at national level, this information is not easy to be found

²⁹ For instance in its Communication, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law /* COM/2011/0573 final, it is stated that: “To establish the necessity for minimum rules on criminal law, the EU institutions need to be able to rely on clear factual evidence about the nature or effects of the crime in question and about a diverging legal situation in all Member States which could jeopardise the effective enforcement of an EU policy subject to harmonisation. This is why the EU needs to have at its disposal statistical data from the national authorities that allow it to assess the factual situation” (emphasis supplied).

and when found, not easy to compare so that the EU institutions have been obliged to start almost from scratch and establish general and specific obligations for the Member States to supply the information needed for the new EU policies. A clear example of a general obligation is afforded by Regulation (EC) No 862/2007³⁰ on European statistics on migration and international protection. According to a recent Commission Report³¹, this Regulation together with Regulation (EU) No 1260/2013 and related implementing measures has resulted in clear improvements in terms of data availability, completeness, quality and timeliness but has also triggered a further need of information on the part of the EU legislator³². Indeed, the Commission has submitted to the European Parliament and the Council a proposal amending Regulation (EC) No 862/2007 which could provide statistics in those areas where stakeholders have expressed clear needs such as: returns (higher frequency and more mandatory disaggregations), resettlement, intra-EU mobility, newly-granted permanent/long-term residence permits, family reunification with beneficiaries of protection, children immigration...

Information is essential not only for the legislator but, when publicly available, also for the purpose of raising the awareness of EU citizens and the media. The proof is that the internet pages publishing EU data on migration have for years been the most consulted and so make possible civic participation in the national and European public debates in these areas.

5. The principle of sincere cooperation and loyalty between the EU and the Member States and between the EU institutions (Articles 4(3) and 13(2) TEU).

According to Article 4(3) TEU, *“The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obliga-*

³⁰ Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection (OJ L 199, 31.7.2007, p. 23).

³¹ See the latest Commission Report COM(2018)0594 of 16 August 18.

³² From this perspective, on 16 May 2018 the Commission submitted to the EP and the Council a proposal (COM (2018) 307 final.) amending Regulation (EC) No 862/2007 which could provide statistics in those areas where the stakeholders have expressed clear needs such as: returns (higher frequency and more mandatory disaggregations), resettlement, intra-EU mobility, newly granted permanent/long-term residence permits, family reunification with beneficiaries of protection, children immigration,...

tions arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

In the FSJA domain these principles are of crucial importance and even more strategic than in the case of the internal market related policies because in the FSJA a proactive role of the national public administration is essential, not only to transpose EU law, but also to preserve the common goods of human mobility, security and dignity both at the supranational and the national level.

This common mission raises the question of the way in which the national administrations play their tasks in these areas also in their capacity as "EU officials".

This applies in particular to national judges, law enforcement authorities, and, more generally, national public bureaucracy. Needless to say, to play this EU role national administrations should be properly trained, even if this is not always the case. Quite surprisingly, even today there is not yet a formal obligation on Member States requiring national judges to know EU law even though almost all national judges have a role to play in protecting EU citizens.

The principle of sincere cooperation and loyalty should, according to Article 67 TFEU take account of national traditions" and in some cases this requirement is not easy recognisable. The fact is that notably in the security arena the Ministers of Interior ask the EU to play roles that may be controversial at national level [the clearest cases have been the Directive on Data Retention adopted in a very short time under the pressure of the UK Presidency in the second half of 2005 and the executive agreements negotiated in 2004 and 2007 with the USA on the passenger name record (PNR)]. The establishment of ambitious objectives requires a closer interaction between the supranational and the national level and this, paradoxically, will inevitably set aside "national practices" so as to preserve the consistency and efficiency of the new EU common policies.

The plainest example of an emerging role for the EU is the so-called "integrated border management" provided for in Article 77 TFEU: it would hardly be possible to grant the same level of protection if each Member State were to follow different standards or "traditions" for its own section of the border.

This principle is extremely important in an area where mutual trust should frame the daily interaction between the European administration

and the national administrations. Otherwise, the mutual recognition of a national measure by the other Member States could be hampered (this could happen with the “European Arrest Warrant” or the “European Investigation Order”, which are labelled “European” but are formally “national”).

6. As a complement of the last-mentioned principle, the Treaty has also strengthened the principle of solidarity and fair sharing of responsibility, including its financial implications (Art. 80 TFEU)³³ in the FSJA for the EU “common” policies on borders (Art. 77 TFEU), asylum (Art. 78 TFEU) and migration (Art. 79 TFEU).

As stated in Regulation (EU) No 2016/1624 on the European Border and Coast Guard “... *Member States retain the primary responsibility for the management of their external borders in their interest and in the interest of all Member States...*” (recital 6, emphasis supplied).

The emergency mechanism framed by the EU to support a Member State which could be under exceptional pressure is also consistent with the principle of solidarity.

This is in particular the case foreseen by Article 78(3) TFEU where one or more Member States are confronted with an emergency situation characterised by “*a sudden inflow of nationals of third countries*”. In this case the Council may adopt provisional measures for the benefit of the Member State(s) concerned.

It is noteworthy that the Court of Justice considered for the first time in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* that Article 78(3) TFEU enables the EU institutions to adopt “... *all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of displaced persons. Those measures may also derogate from legislative acts provided, in particular, that their material and temporal scope is circumscribed and that they have neither the object nor the effect of replacing or permanently amending legislative acts...*” (emphasis supplied).

³³ Article 80: “The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle”.

This is the first and for the time being the only case where the Court of Justice has accepted that an administrative measure could suspend the impact of a legislative act without the consent of the European Parliament, which could be considered a dangerous precedent³⁴.

Another example of a specific solidarity mechanism is Article 222 TFEU, which applies in case of terrorist attacks or natural disasters³⁵. From the same perspective, EU legislation on borders, asylum and migration increasingly provides for detailed measures and procedures in order to detect potential risks and intervene in case of emergencies.

These “alert” and intervention systems are triggered by reports adopted under the responsibility of EU Agencies such as Frontex for the external Borders, EASO for asylum or EUROPOL in case of an emerging threat to be dealt with under police cooperation or ECHO (a specialised Commission Service responsible for supporting Member States when civil protection is at stake, which will soon be replaced by a fully fledged Civil Protection Mechanism).

7. The principle of “indirect administration”, whereby the responsibility for implementing and applying EU law belongs primarily to the Member States (Art. 4(3), 2nd subparagraph, TEU, and Art. 291(1) TFEU), also applies in the case of the FSJA, but with some important specificities.

As has been abundantly shown over the years by Schengen cooperation, sharing the same objectives and duties requires not only a common legal framework but also a high level of administrative, organisational and financial integration so as to overcome the difficulties arising from the coexistence of 28 different administrative cultures, tools and regulations.

To do so and to foster police and judicial cooperation, the Treaty itself provided the legal basis for two security-related agencies (EUROPOL and EUROJUST) and a European Public Prosecutor. Moreover, since Amsterdam the EU legislator has created several new EU Agencies such as FRONTEX, ENISA, EASO, FRA, The European Observatory of Drugs and EU-LISA (which is in charge of the management of EU-wide databases such as SIS, VIS, EURODAC and in the near future ESTA and the Entry-Exit database).

³⁴ A different solution requiring the change of the legal basis to Art. 78(2) by preserving in the meantime the impact of the contested decision would have probably been sounder.

³⁵ Arts 196, 214 on Civil Protection and Art. 222 of the TFEU on the solidarity clause.

Common networks have also been developed giving the possibility of interconnecting national security related databases such as the PRUM System, ECRIS, and the EU-PNR.

Europol and Eurojust have also established their own security-related databases where the national information can be accessed under specific conditions.

Last but not least, operational solidarity could also be supported by financial means accessible through the European Funds on Borders and Security as well as by some EU Agencies (Frontex, Europol). Examples of integrated administration are also the joint intervention teams, emergency procedures³⁶ to counter internal and external threats³⁷.

Furthermore, to strengthen the mutual trust between the Member States which is essential when protecting the same external border or being part of the same area of justice, the Treaty provides for a “mutual evaluation” mechanism which can cover all the policies in Title V (Art. 70 TFEU). This mechanism also provides for the association of the European Parliament and the national parliaments, which may explain why until now it has covered only Schengen Cooperation³⁸.

8. The so-called “flexibility clause” contained in Article 352 TFEU whereby the EU institutions can adopt measures which are not foreseen by the Treaty but are needed to reach one of its objectives (the so-called

³⁶ See the judgment in Joined Cases C-643/15 and C-647/15 *Slovak Republic, Hungary v Council* ECLI:EU:C:2017:631 on Decision (EU) 2015/1601 dealing with provisional measures in the area of international protection for the benefit of the Italian Republic and the Hellenic Republic and emergency situation characterised by a sudden inflow of nationals of third countries to certain Member States.

³⁷ See the Council's measures dealing with Integrated Political Crisis Response Arrangements and Solidarity Clause Implementation.

³⁸ See Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis, OJ L 295, 6.11.2013, p. 27. With the informal agreement of the EP the Council unanimously agreed that the general Schengen “evaluation mechanism” should remain a “peer evaluation” exercise, based on Article 70 TFEU, with Commission involvement. Evaluations would cover all aspects of the Schengen *acquis*, including the absence of border controls at internal borders. Multiannual and annual evaluation programmes would be established by the Commission, and include both announced and unannounced on-site visits. Frontex should make annual risk analyses, and submit recommendations accordingly. In case of deficiencies, the MS concerned will be required to submit an action plan to remedy it. See the text here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1053>.

“implicit powers”) is also applicable in the FSJA but the Treaty has also foreseen some “evolutionary” clauses specific to this area.

Pursuant to the third subparagraph of Article 83(1) TFEU, the Council with the consent of the European Parliament may identify a new area of crime for definition other than the ones already listed in the second subparagraph (*terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime*). Under Article 86 (4) TFEU, the European Council acting unanimously and with consent of the EP may extend the powers of the European Public Prosecutor’s Office to include serious crime having a cross-border dimension.

9. Last but not least, the principle of democracy has been strengthened because, as in the case of the “traditional” policies of the EU, FSJA legislation has now to be adopted by the ordinary legislative procedure (co-decision) involving a qualified majority vote in the Council (including those are where before the Lisbon Treaty the Parliament was only consulted or merely informed).

Abandoning unanimity in the Council was not easy and was made possible, on the one hand, by preserving the possibility for Member States to launch a legislative initiative without the “filter” of the Commission (but the initiative should be submitted by at least a quarter of the Member States - Art. 76 TFEU) and, on the other hand, by allowing a Member State to block the adoption of a legislative measure if it considers that the text would affect fundamental aspects of its criminal justice system.

In such case, the proposal is referred to the European Council, which has three months in which to find a solution. If it fails to do so the measure will not be adopted, but if at least nine Member States wish to adopt it this could happen under an “enhanced cooperation” procedure without the intervention of the Commission (as foreseen for enhanced cooperation in the relevant section of the Treaties).

The EU decision-making process has also been further democratised by giving the possibility to the national parliaments of playing an enhanced role in assessing the observance of the subsidiarity principle in the areas of judicial co-operation in criminal matters and police cooperation (Article 69 TFEU), in evaluating the implementation of the Union’s policies (Art. 70 TFEU), in being periodically informed by the Committee for the Internal Security strategy (Art. 71 TFEU), in evaluating Eurojust’s activities (Art.

85(1), 3rd subpara., TFEU) and in scrutinising Europol's activities [Art. 88(2), 2nd subpara., TFEU]. Those provisions complement and strengthen the national parliaments' role as provided for in Article 12 TEU and the Protocols on the application of the principles of subsidiarity and proportionality³⁹.

2.4. When general rules have an exception: opt-out/opt-in countries and enhanced cooperation.

An important exception to the generalisation of the ordinary regime for the FSJA policies is the fact that even after Lisbon, Denmark, Ireland and the United Kingdom continue to benefit from a special opt-out/opt-in regime under Protocols to the Treaties. Needless to say, this special status is due more to political reasons than to objective reasons connected with these countries' situation. As a result of this special status also the nationals of these countries are not subject to the same obligations or enjoy the same protection as the EU citizens of the other Member States⁴⁰.

However, the opt-out Countries have accepted that the other EU countries can advance in some domains under a species of "enhanced cooperation".

³⁹ In the field of FSJ, national parliaments have to be informed, as is also the case for the European Parliament, of the content and results of the evaluation system of the implementation of FSJ policies by Member States. This system is to be put in place by the Council (Art. 70 TFEU). National parliaments will also participate, together with the European Parliament, in a scrutiny procedure of Europol's activities to be laid down by a regulation adopted under the ordinary legislative procedure (Art. 88(2), 3rd subparagraph, TFEU). The same will apply to their involvement in the evaluation of Eurojust's activities (Art. 85(1), 3rd subparagraph, TFEU).

⁴⁰ For the same political reasons (the special status of UK, IRL and DK) the provisions concerning passports, identity cards, residence permits or any other such document which before Lisbon were included under citizenship title are now also subject to the opt out/opt in system, as is the legal basis enabling the Council to adopt by QMV measures on the freezing of assets to fight terrorism and related activities, which was to be inserted into the general provisions of the FSJ Title (Art. 75 TFEU) instead of the Chapter on capital and payment (this opt-out will not be possible for Ireland, which will participate in the adoption and in the implementation of such measures on the same basis as the other Member States).

On paper the three countries can still at any moment draw to an end their special status but the opposite is true. UK has even triggered a general BREXIT, Ireland maintains its exceptional status (which was justified by the Common Travel Area with the UK) even after BREXIT and Denmark decided in 2015 by referendum even to opt-out from Europol.

The first and still most important case is the Schengen Cooperation⁴¹, which covers the external borders policy, some aspects of irregular migration as well as some aspects of police cooperation. As mentioned above, Schengen Cooperation has been strengthened and its governance has been updated to take into account the post-Lisbon situation.

Thanks to the Schengen cooperation, the EU has now the European Border Guard, the first form of an integrated national/supranational border management (IBM). It is worth noting that the UK has tried to profit by some of the recent improvements of the Schengen system (notably for security purposes) but, confronted with the refusal of the Schengen States, it challenged some of the Schengen measures before the Court of Justice.

The latter rejected the UK request by holding that that all proposals and initiatives to build upon the Schengen *acquis* must be consistent with the provisions they implement or develop.

To preserve the coherence of the Schengen *acquis* the CJEU and avoid cherry picking by the opt-out/opt-in countries, the Court of Justice also stated that the Schengen States “*are not obliged, when they develop it and deepen their closer cooperation, to provide for special adaptation measures for the other MS which have not taken part in the adoption of the measures relating to earlier stages of the acquis’ evolution*”⁴².

A similar situation was present at the end of the five years’ transitional period for the EU measures adopted in the area of police and judicial cooperation in criminal matters before the entry into force of the Lisbon Treaty. Again, thanks to a specific protocol, the UK was given the possibility to opt-out from all these measures and of re-opting in only to some of them provided that the consistency of the policy concerned was preserved.

⁴¹ The Schengen Area gradually expanded from the original five to include Italy (November 1990), Spain and Portugal (June 1991), Greece (November 1992), Austria (April 1995) and Denmark, Finland and Sweden, as well as Iceland and Norway (December 1996). The Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia joined in December 2007, and the associated country Switzerland and thereafter Liechtenstein in 2008. Romania and Bulgaria await unanimous approval from the other Schengen members before they can join, while Cyprus has not completed preparations to join because of the island’s division. Overall the “Schengen Area” comprises the territory of 22 EU and four non-EU MS, in which more than 400 million citizens are able to travel without being subject to internal border controls. It covers a total area of 4.3 million km², has 42 673 km of external maritime borders, 7 721 km of external land borders and 1 792 external frontier checkpoints, including international airports.

⁴² Judgment in Case C-482/08 *United Kingdom v Council* ECLI:EU:C:2010:631.

3. Main texts adopted post-Lisbon and the persistence of intergovernmentalism in the FSJA.

3.1. Main FSJA texts adopted post-Lisbon.

Almost ten years after the entry into force of the Treaty of Lisbon and its undeniable constitutional advances, the Freedom Security and Justice Area is still far from becoming what it was supposed to be. Even if in quantitative terms this is still one of the most active areas covering 25-30% of the EU legislative activity, the outcome of this activism is rather limited and imbalanced compared to the ambitious targets set out in the treaties and only few of these policies have been upgraded to the new Lisbon Constitutional framework (following the so-called “Lisbonisation” process), with most of them still trapped in the previous political and institutional framework.

a) Protecting and promoting fundamental values and rights

In the last decade, the protection of EU founding values and fundamental rights in several EU Member States has been threatened not only because of exceptional or emergency situations (as it happened in the case of the mass influx of irregular migrants into Greece, where both the European Court of Human Rights and the Court of Justice considered that there was a systemic failure in respect of the granting of asylum⁴³).

But this could also be the outcome of a clear political choice made by national Governments with the support of a political majority in their Parliament through the adoption of legislation which could be against the EU founding values referred to in Article 2 TEU, thereby triggering the alert and sanctioning procedures provided for in Article 7(1) and 7(2) TEU.

Poland is the first country for which the “alert” mechanism has been formally triggered. On 20 December 2017, the Commission invoked⁴⁴ the Article 7(1) procedure for the first time, and submitted a reasoned proposal for a Decision of the Council on the determination of a clear risk of a serious breach of the rule of law. This is because the latest judicial reforms in Poland mean that the country’s judiciary is now under the political control of

⁴³ See, for the European Court of Human Rights, the *M.S.S.* judgment of 21 January 2011 condemning the automatic application of the Dublin Regulation by Member States for determining which Member State was responsible for examining the asylum application, and, for the CJEU also on the Dublin Regulation, the *N.S.* judgment of 21 December 2011.

⁴⁴ See the press release here: http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

the ruling majority. According to the Commission, in the absence of judicial independence, serious questions are raised about the effective application of EU law, from the protection of investments to the mutual recognition of decisions in areas as diverse as child custody disputes or the execution of European Arrest Warrants. The European Parliament has already endorsed the Commission initiative.

While awaiting the Council's reaction to the Polish case, the European Parliament has voted in the plenary session in favour of a parallel Article 7(1) procedure against Hungary because of similar failures connected with the independence of the judiciary, corruption, freedom of expression and the rights of Roma and Jewish minorities and refugees⁴⁵.

These are the first two emerging cases involving the Article 7 procedure but it is abundantly clear that this procedure is too complex and politically difficult to be launched.

There are some initiatives both of the European Parliament and the Commission designed to overcome the current difficulties by establishing a permanent evaluation mechanism for all the EU Member States but for the time being the Council has not been particularly receptive⁴⁶.

However, recently the Court of Justice, which has only a secondary role in the Article 7 procedure, has opened up a new way to overcome the prob-

⁴⁵ See the Plenary adoption of the Sargentini Report: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2018-0340&language=EN&ring=A8-2018-0250>.

⁴⁶ Both the Commission and the European Parliament (The European Parliament has adopted several resolutions on this subject. See the latest (adopted in 2016) here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2016-0283+0+DOC+XML+V0//EN>) are now convinced that a permanent evaluation mechanism on the protection and promotion of the rule of law should be established for all the EU Member States as a measure preventing violations (See the new Commission "Rule of Law Framework" here: https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework_en). The Commission has now foreseen a periodic assessment of the quality of justice in the Member States in its so-called "European Semester" procedure covering the Member States activities relevant for the EU budgetary discipline. On the Council side, the only initiative taken is the decision of December 2014 to hold an annual political dialogue on the rule of law in order to promote and safeguard the rule of law in the framework of the Treaties as one of the key values on which the Union is based. The first dialogue took place in the Council (General Affairs) on 17 November 2015 and dealt with racism and discrimination; the second held in May 2016 focused on the challenges of the current migratory flows with the participation of the Director of the EU Fundamental Rights Agency; the third held on 17 October 2017 was on "Media Pluralism and the Rule of Law in the Digital Age".

lem of Member States violating EU values and fundamental rights in specific cases. This has been the case when the implementation of some freedom, security and justice area policies were at stake such as asylum⁴⁷, judicial cooperation in criminal matters and the rule of law principle⁴⁸.

As recalled above, the Court of Justice gave a major judgment on 8 April 2014 in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*. This ruling has also been taken in account in Council internal guidelines⁴⁹, which rightly recalls that according to the Court, EU measures “... *do not stand a serious chance of passing the legality test unless they are accompanied by adequate safeguards in order to ensure that any serious restriction of fundamental rights is circumscribed to what is strictly necessary and is decided in the framework of guarantees forming part of Union legislation instead of being left to the legislation of Member States. Moreover, the legislator should be able to demonstrate that it has explored alternative ways to attain the objectives pursued which would be less restrictive of the rights of the individuals concerned*” (emphasis supplied).

However, it is not self evident that these guidelines have been followed by the EU Co-legislators and that the principle of legal certainty and foreseeability of EU legislation has been taken in account in EU legislation.

⁴⁷ See judgments in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80).

⁴⁸ See the recent CJEU ruling on 25 July 2018 Case C-216/18 PPU on the independence of the judiciary in Poland: “(35). EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 34 and the case-law cited therein)”. (36) Both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter (see, to that effect, the judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 49 and the case-law cited therein), are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 26 and the case-law cited therein)”.

⁴⁹ See: <http://data.consilium.europa.eu/doc/document/ST-5377-2015-INIT/en/pdf>.

One of the most recent and controversial⁵⁰ cases was the EU Directive on Terrorism⁵¹.

Other initiatives at procedural level have been taken at European Parliament and European Commission level and a reference to fundamental rights has been inserted almost in all the measures dealing with the activities of the EU agencies operating in the FSJ domain but, taking in account the vocal critics of several civil society organisations, it is hard to prove that what is present on paper corresponds to the reality.

On a more positive note, it is worth recalling that, at the legislative level, the biggest achievement since the entry into force of the Lisbon Treaty was the adoption of the new EU legal framework for the protection of personal data as provided for in Art. 16 TFEU and Art. 8 of the EU Charter. The two main texts already into force are Regulation (EU) 2016/679 so called General Data Protection Regulation⁵² and the Directive (EU) 2016/680 with regard to the processing of personal data for public security purposes⁵³. These measures will soon be followed by a regulation on the protection of personal data by the EU institutions, agencies and bodies as well as by a specific directive dealing with protection of personal data in the electronic services (e-privacy).

By protecting individuals against all kinds of abuses from other individuals and from the public authorities at national and supranational level, this regulation is an important achievement both at European and international level as it also sets the standards for the transfer of personal data to third countries and notably the USA. Together with the ground-breaking post-Lisbon jurisprudence in this area, it set a strong basis also for the “Lisbonisation” of most of the EU legislation in the FSJA, which has an impact on the individual (and this irrespective of the opt-in/out of the UK, IRL and DK).

The Lisbon Treaty has also strengthened the legal basis for protecting the right of the individual to have access to documents of the EU institutions, bodies and agencies (Art. 15 TFEU and Art. 42 of the EU Charter) by

⁵⁰ On the EU Directive on Terrorism, see: <https://free-group.eu/2017/02/15/the-time-has-come-to-complain-about-the-terrorism-directive/>.

⁵¹ See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017L0541>.

⁵² See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1528874672298&uri=CELEX%3A32016R0679>.

⁵³ See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.119.01.0089.01.ENG&toc=OJ%3AL%3A2016%3A119%3ATOC.

strengthening the role of participative democracy⁵⁴ notably in the ascending phase of the EU legislative procedures⁵⁵. Unfortunately the revision of the pre-Lisbon rules in this sphere (Regulation No 1049/01) is still blocked in the Council because of the strong resistance of the Council and of the Commission to implementing the EU principles.

The only real progress made in this domain is due mainly to the CJEU jurisprudence, which has taken seriously into account the new post-Lisbon framework, which requires that not only the votes but also the legislative debates should be public, Art. 15(3)TFEU, both in the European Parliament and in the Council so that the position of the different national delegations may be known⁵⁶ as well as the information related to the foreseeable impact of a legislative procedure⁵⁷. An important ruling has been recently adopted by the General Court considering that the documents shared during the so-called “legislative trilogues” should also be accessible as legislative documents despite the “informal” character of these interinstitutional meetings⁵⁸.

Unfortunately, similar progress towards transparency have not been made for access to information/documents connected with the implementation phase of EU legislation as the CJEU has recognised that a general presumption of confidentiality could cover the documents exchanged between the Commission and the Member States in the pre-legislation phase⁵⁹ even if that is the moment when the rights and obligations of EU citizens take shape.

Another weak point of the EU legislation which is liable to affect not only the EU Citizens but also the European Parliament itself in the FSJA is the treatment of classified information (confidential, secret and top secret documents). The legal framework is very poorly defined by Article 9 of

⁵⁴ See also Arts 10 and 11 TEU which establish that “[d]ecisions shall be taken as openly and as closely as possible to the citizen” and that both citizens and representatives should be given opportunities to “make known and publicly exchange their views in all areas of Union action”.

⁵⁵ Which were already the main subject of a seminal ruling of the CJEU in Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* EU:C:2008:374.

⁵⁶ See T-452/10 *ClientEarth v Council* ECLI:EU:T:2011:420.

⁵⁷ See the CJEU ruling of 4 September 2018 in Case C-57/16 P *ClientEarth v European Commission* ECLI:EU:C:2018:660.

⁵⁸ See *De Capitani v European Parliament* Case T-540/15, ECLI:EU:T:2018:167.

⁵⁹ See the judgment of 11 May 2017 in C-562/14 *Sweden v Commission* ECLI:EU:C:2017:356 dealing with the so-called EU Pilot Procedure.

Regulation No 1049/01 and the real standards applicable to the access/exchange of this information are the ones defined in the internal security regulation of the Council, which mirrors NATO standards.

Quite bizarrely, the rules on the EU Official Journal are not defined on the transparency legal basis but on “implicit powers”.

Another legislative procedure giving specific expression to a fundamental right which has an impact on the FSJA (even if is not provided for in Title V TFEU) is a proposal for a new directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation⁶⁰. The text has been blocked in the Council since 2008 (mainly because of a strong reservation of the German delegation). To partially cover this domain the Commission has adopted some non-binding recommendations on standards for equality bodies created in each Member State⁶¹.

b) Human mobility and protection of EU borders

Adopted on the basis of Article 77 TFEU, EU Regulation No 2016/1624 on the European Border and Coast Guard (EBCG) could be seen as a major evolutionary step and, at the same time, a revolutionary one in the relationship between the EU and its Member States not only insofar as it concerns the protection of EU borders, but also in the wider perspective of the establishment of an European area of Freedom, Security and Justice.

Its aim is legally to frame the question of human mobility and human

⁶⁰ The latest consolidated provisional text resulting from 10 years negotiation is the Council doc. 10045/18.

⁶¹ See the Commission document C(2018) 3850 final (https://ec.europa.eu/info/sites/info/files/2_en_act_part1_v4.pdf). According to the Commission the Member States should ensure the independence of equality bodies through their administrative structure, budget allocation, procedures for appointing and dismissing staff and preventing conflicts of interest. They should make it possible for equality bodies to gather evidence and information. On functions: Member States should enable equality bodies to exercise their functions covered by their mandate. In particular, they should be able to provide independent assistance such as handling individual or collective complaints, providing legal assistance and representing victims or organisations in court. Further functions include independent surveys, reports, recommendations or promotion of equality.

Adequate resources and staffing: Member States should ensure equality bodies have the necessary human, technical and financial resources and infrastructure. Effective coordination and cooperation: Member States should provide the necessary conditions to ensure appropriate communication between equality bodies within the Member State across the EU, and internationally.

security in the post-Lisbon legal framework. Over thirty years after the first Schengen agreement, this regulation outlines, for the first time, at legislative level, the main “... *measures necessary for the gradual establishment of an integrated management system for external borders*” as required by Article 77 TFEU.

The generic term “measures” in the Treaty has already paved the way for the co-legislator to strengthen the general EU rules found in the Schengen Borders Code⁶² as well as within the EUROSUR⁶³ system by creating supra-national structures, such as FRONTEX⁶⁴, administrative networks and EU wide information systems⁶⁵. The aim of all such “measures” is to establish a stronger complementarity between the European and national levels.

The new regulation pushes this objective even further by widening the scope of the existing EU measures, announcing a fully-fledged integrated border policy, a multilevel national-European Border Guard, amending the Schengen Borders Code, and strengthening the FRONTEX coordinating role towards the national authorities dealing with border protection that operate in the so-called “hotspots” in search and rescue operations and in the return of illegal migrants.

The creation of “*an integrated management system for external borders*” has raised for the first time in serious terms the problem of the interdependence between all the national administrations and makes it evident that solidarity should not be linked to the “goodwill” of the participants but is the consequence of a shared responsibility where all the participants are responsible “*in solido*”. As such, it is probably the most important result to

⁶² Recently codified: Regulation (EU) No 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, pp. 1–52.

⁶³ See Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir), OJ L 295, 6.11.2013, p. 11–26.

⁶⁴ See Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. The regulation has already been amended in 2007, 2011, 2013 and 2014. The current consolidated version can be found here: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:02004R2007-20140717>.

⁶⁵ See Regulation (EU) No 1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 286, 1.11.2011, p. 1–17.

date at EU level in the post-Lisbon decade and will probably be driving factor of future developments also for other complementary policies dealing with asylum, migration and even internal security.

c) The never-ending struggle for a Common EU Asylum Policy

Article 78 TFEU is the new EU legal basis of the asylum policy. Twenty years ago, the European Council in Tampere was already planning the establishment of a common European asylum system. In a first phase before Lisbon, some minimum rules were adopted, followed, in a second phase after Lisbon between 2009 and 2013, by several components of the system, which are currently under revision.

The main texts are:

1. a directive on the “procedures” to be followed when examining a request for asylum. It aims at fairer, quicker and better quality asylum decisions notably for most vulnerable people such as unaccompanied minors and victims of torture;

2. a directive on the “reception” conditions to be granted to asylum seekers (such as housing) across the EU, which states the fundamental rights to be protected by ensuring that detention is only applied as a measure of last resort;

3. a “qualification” directive which clarifies the grounds for granting international protection. It will also improve the access to rights and integration measures for beneficiaries of international protection;

4. but the stumbling block of the entire system is the revised “Dublin” Regulation, which defines the Member State which has to examine the request for asylum. In most cases, this is now the State of first entry of the refugee, as it was in the original Convention agreed between the EU Member States in 1990.

As the current system puts exceptional pressure on the Member States whose borders are also the external borders of the EU, there has been several unsuccessful proposals by the Commission and notably by the European Parliament for sharing this burden by relocating the asylum seekers notably in case of a mass influx of refugees, as was the case in 2015 at the height of the war in Syria⁶⁶.

⁶⁶ It would be sensible to replace the key principle of the “Dublin” Regulation on the competence of the first Member State of entry by the principle of the wish of the applicant. The principle is not new and was evaluated (and dismissed) by the European Commission it-

The Common European Asylum System will be completed by:

5. a European measure defining which third countries should be considered “safe”, thereby making it easier to examine asylum requests and decide on the return of people who do not qualify for international protection;

6. the revision of the EURODAC Regulation which requires the fingerprints of asylum seekers to be stored in a European Database (to avoid multiple requests for asylum by the same refugee). Under the current revision, law enforcement authorities would have access to the EU database in order to prevent, detect or investigate the most serious crimes, such as murder and terrorism.

It is not clear whether the third package of six legislative proposals will be adopted before the 2019 European elections by so framing the Common European Asylum System. If this is not the case, there is a clear risk of a major crisis spreading also to the other EU policies on borders and migration and to the FSJ itself.

d) A EU Migration policy still in the making

Article 79 TFEU is the ambitious new legal basis for EU migration policy. The current EU *acquis* deals notably with the issues of short- and long-term visas and with several measures to fight irregular migration. The most important text is the “return” directive, which was adopted already before the Lisbon Treaty, together with other measures against traffickers and smugglers of human beings and imposing sanctions on employers of illegally staying third-country nationals.

As regards visa policy, the EU has adopted a quite advanced legal framework and, following the example of some third countries such as USA, Australia and Canada, the EU is currently adopting a rather far-reaching strategy with the Travel Authorisation System (ESTA) for all third country nationals wishing to enter the territory of the EU and an ambitious system monitoring the presence on the EU territory of visa overstayers (the so-called “Entry-Exit” system).

Regular migration: like other developed economies Europe is trying to

self in 2001 when the so-called Dublin Regulation was presented. Already then, the Commission itself recognised that the principle of the first Member State to be entered could have been abandoned once the procedures for examining applications, the attribution of the status of refugee or of a person have subsidiary protection and the conditions for acceptable were harmonised as between the Member States.

attract workers with the skills it needs. It has done so by means of a number of measures, such as the “single permit” directive, which establishes a single application procedure to obtain the right to work and reside in the EU, and the “researchers” directive and the “Blue Card” directive, which target highly skilled migrants (as the changes in the skills required by the EU are expected to show more than a 20% increase before 2025 in the proportion of jobs employing higher-educated labour).

e) A still virtual Internal Security strategy

Several legal bases in the Lisbon Treaty make it possible to establish a consistent EU Internal Security policy from the strategic to the legislative and operational levels.

The first post-Lisbon Internal Security Strategy (ISS) covering the period 2010-2014 has been adopted on 10 March 2010⁶⁷. Its aim was “to establish a shared agenda on internal security that enjoys the support of all Member States, EU institutions, civil society and local authorities, and, interestingly enough, ...the EU security industry”⁶⁸.

As provided in Article 83 TFEU, the ISS was aimed at the most serious crimes such as “... terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime”.

The ISS was also in favour of the exchange of information between the EU Member States and the EU in accordance with the so-called “availability” principle, according to which each law enforcement authority should share with others the information needed, notably for joint operations.

The Council Strategy was followed by a Commission Communication called ISS Agenda⁶⁹.

These strategic documents have been recently updated by an EU

⁶⁷ The Internal Strategy Policy of the European Union: “Towards a European Security Model” was adopted by the Council on 25 and 26 February 2010 and approved by the European Council on 25 and 26 March 2010.

⁶⁸ S. CARRERA, E. GUILD, *The EU Internal Security Strategy and the Stockholm Programme: A Challenge to Rule of Law and Liberty in Europe*, <http://www.notre-europe.eu/media/tgae20114ccarreraguild-.pdf?pdf=ok>.

⁶⁹ European Commission (2010), *Communication from the Commission to the European Parliament and the Council The EU Internal Security Strategy in Action: Five steps towards a more secure Europe*, 22 November 2010, COM(2010) 673 final.

Global Strategy for Foreign and Security Policy (EUGS), which also covers aspects of the Internal Security Strategy⁷⁰ and in 2015 by a Commission “European Agenda on Security”⁷¹, which is constantly updated by periodic reports adopted under the responsibility of Julian King, a recently appointed Commissioner for internal security who works in close cooperation with Commissioner Avramopoulos in charge of migration and home affairs.

The main weaknesses of all these documents is that they are not binding and are adopted without the participation of the European Parliament and, in all likelihood, of the national parliaments. They cover only activity at EU level with practically no reference to the situation on the ground in the Member States because of lack of data, which are in most cases inaccessible or unverifiable.

But the real weakness of this sector is that every Member State has its own approach to internal security also as far as democratic control is concerned.

In principle, the national administrations are accountable to their national parliaments and this explains why they did not share the data with the European Parliament and the Commission at least until the end of the five years’ transitional period after Lisbon in December 2014.

Unlike Schengen cooperation, which has been built from the bottom in each Member State since 1995 upon the entry into force of the Convention Implementing the Schengen Agreement (CISA), police cooperation is still fragmented, not only at EU level, but also even inside the Member States themselves (notably when organised at federal level). The only possibility for the EU to build a common platform is to take stock of the implementation at national level of the EU measures adopted before Lisbon and give

⁷⁰ The document notably states “... *The EU Global Strategy starts at home. Our Union has enabled citizens to enjoy unprecedented security, democracy and prosperity. Yet today terrorism, hybrid threats, economic volatility, climate change and energy insecurity endanger our people and territory. An appropriate level of ambition and strategic autonomy is important for Europe’s ability to promote peace and security within and beyond its borders. We will therefore enhance our efforts on defence, cyber, counterterrorism, energy and strategic communications. Member States must translate their commitments to mutual assistance and solidarity enshrined in the Treaties into action. The EU will step up its contribution to Europe’s collective security, working closely with its partners, beginning with NATO*”

⁷¹ See the European Commission Communication here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52015DC0185>.

the possibility to the National Administrations to cooperate on a voluntary basis on specific priorities listed in the so called “Policy Cycle” operational since 2010 under the coordination of Europol⁷².

f) A criminal justice area still in the making

Since the entry into force of the Lisbon Treaty, only a limited number of measures have strengthened some procedural⁷³ or victims’ rights⁷⁴. Most of the legislation has been focused on criminal sanctions and has been adopted on the basis of the relevant legal basis contained in Title V TFEU (Arts 82, 83, 85 and 86 TFEU) by strengthening the mutual recognition of national measures⁷⁵ and preventing⁷⁶ and fighting crime⁷⁷.

⁷² See: <http://www.consilium.europa.eu/en/documents-publications/publications/eu-policy-cycle-tackle-organized-crime/>.

⁷³ Quite importantly the Treaty provides in this case for the adoption of “minimum rules”, which does not prevent Member States from maintaining or introducing a higher level of protection for individuals.

⁷⁴ See the Directives on the right to information in criminal proceedings (2010/0215 (COD)) and the right to interpretation and translation in criminal proceedings (2010/0801 (COD)), the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest - strengthening certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings - procedural safeguards for children suspected or accused in criminal proceedings - legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings - the European protection order (2010/0802 (COD)).

⁷⁵ See the mutual recognition of freezing and confiscation orders, the European protection order (2010/0802 (COD)) - the European Investigation Order in criminal matters - freezing and confiscation of proceeds of crime in the European Union - European Production and Preservation Orders for electronic evidence in criminal matters.

⁷⁶ Exchange of information on third country nationals and European Criminal Records Information System (ECRIS) - Establishing a centralised system for the identification of Member States holding conviction information on third country nationals and stateless persons (TCN) to supplement and support the European Criminal Records Information System (ECRIS-TCN system) - Use of Passenger Name Record data (EU PNR) - Retention of data processed in connection with the provision of public electronic communication services.

⁷⁷ Such as the Directives on trafficking in human beings - Sexual abuse and sexual exploitation of children and child pornography (repeal of Framework Decision 2004/68/JHA) - Combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism - Combating fraud and counterfeiting of non-cash means of payment - Attacks against information systems and repealing Council Framework Decision 2005/222/JHA - Minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, as regards the definition of the term “drug” - Countering money laundering by criminal law.

Criminal sanctions have also been adopted on the basis of the internal market legal basis⁷⁸, unfortunately in the absence of a general criminal law strategy for the EU.

In parallel with the adoption of internal measures, the EU has also concluded or it is currently negotiating international agreements with third countries or acceding to some of the Council of Europe's Conventions in this domain, such as the Convention on Terrorism and its protocol on foreign fighters⁷⁹.

Quite importantly, the EU has strengthened the role of EU agencies, such as EUROJUST, by taking into account the new post-Lisbon situation and has adopted via enhanced cooperation the regulation on the European Public Prosecutor⁸⁰. In an initial phase the latter will be competent for crimes affecting the EU financial resources but it has already been announced that in the coming years this EU Body will also be in charge of the prosecution of terrorism and other serious crimes, as foreseen already by Article 86 TFEU.

From a more general perspective, the EU is tacking stock of the work done in the criminal law field by the Council of Europe, which has adopted several Conventions which have been signed and/or ratified by almost all the EU Member States (such as the Budapest Convention on Cybercrime or the Convention on terrorism and its Protocol on foreign fighters).

It is worth recalling that the Council of Europe's expertise is essential also in the domain of the rule of law with the Venice Commission and in monitoring the quality of justice in the Member States.

⁷⁸ See the Directives on minimum criminal sanctions for insider dealing and market manipulation as well as the Directive of 11 July 2012 providing common definitions of offences against the EU budget as fraud or the misuse of public procurement procedures.

⁷⁹ See also the EU-USA agreement on the processing and transfer of financial messaging data (Terrorist Finance Tracking Program) (2010/0178(NLE)) – the first version of which was rejected by the EP – and the EU-USA agreement on transfer of Passenger Name Records (PNR) (2009/0187(NLE)) as well as the EU-Japan Agreement on mutual legal assistance in criminal law (2009/0188 (NLE)). In the same context, it is worth recalling that the European Parliament withheld its consent to the ACTA international agreement (2011/0167(NLE)), in particular because of the inclusion of criminal sanctions for violation of intellectual property rights, which it considered neither clearly defined nor proportionate.

⁸⁰ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') OJ, L 283, 31.10.2017, p. 1.

3.2. The persistence of intergovernmentalism in the FSJA.

As indicated in the previous paragraphs, almost ten years after the entry into force of the Lisbon Treaty, it appears that the EU Member States, either alone, or through the intergovernmental method, have continued to control FSJA, and therefore there is little coherent policy at the EU level, and to the extent that it does exist, it lacks transparency, participation of the European Parliament, and oversight of the European Parliament (i.e. democratic accountability).

There are a number of devices that have been used, notwithstanding the terms of the Lisbon Treaty, to increase Member State power in European governance, at the expense of the European Parliament. Although the tension between national sovereignty and supranationalism is endemic to European governance, in particular critical areas of state sovereignty such as internal security, it has intensified during the past years of crisis politics.

The main “devices” used by the EU Member States through the European Council and the Council to preserve the pre-Lisbon situation have been: (a) withholding essential information and lack of cooperation in the legislative, implementation, and executive process; (b) dissociating at EU level the different phases of the EU political cycle: strategy, legislation, and implementation; (c) circumventing the co-decision procedure and parliamentary input through the choice of the CFSP as a legal basis or other “creative” alternatives; d) empowering the EU agencies, which are creatures of the Member States, to exercise both executive and political functions⁸¹.

a) Withholding essential information and lack of cooperation in the legislative, implementation, and executive process

It is almost impossible to have a public policy without a consistent flow of comparable information of the situation on the ground in the different EU Member States.

This has become self-evident with the evolution of the EU's role after the Maastricht Treaty both in the economic domain after the launch of the EURO and in the area of freedom, security and justice.

Unfortunately, in the case of the FSJA, with the exception of Schengen cooperation, the evolution of the EU institutions' role has not been sup-

⁸¹ Needless to say, this situation would not had been possible without the support of the Commission and of the substantial retreat of the European Parliament itself.

ported by a permanent and structured “bottom-up” exchange of relevant information as there is for EURO governance.

Notwithstanding the Lisbon Treaty, interior and justice ministers are still not sharing information between themselves and with the EU institutions so that it is hardly possible to shape or correct EU policies in sensitive areas. This may also explain why even today the Commission finds it difficult to draw up a proper impact assessment⁸² in most of its legislative proposals dealing with the FSJA.

To overcome this, the EU has detailed in several legislative texts some specific obligations relating to sharing factual data with the Commission and with the other Member States, the most successful example being Regulation (EC) No 862/2007⁸³ on European statistics on migration and international protection (see above).

In the field of security, the situation is less satisfactory; even when the legislation laid down an obligation to share, data, access to the relevant information is not granted. A clear example is the implementation of the EU anti-terrorism policy, where the recent EU Directive against terrorism⁸⁴ was amended also to make more clear the obligation on the Member States already provided for by a pre-Lisbon Decision (Decision 2005/671/JHA) of sharing the “*relevant information gathered by its competent authorities in the framework of criminal proceedings in connection with terrorist offences*” so that it can be “*made accessible as soon as possible to the competent authorities of another Member State where the information could be used in the prevention, detection, investigation or prosecution of terrorist offences as referred to in Directive (EU) 2017/541, in that Member State, either upon request or spontaneously, and in accordance with national law and relevant international legal instruments*”.

This being the case it also becomes impossible for the European Commission to prepare impact assessments for the future legislation not to speak of the European Parliament, which lacks any direct contact with the national administrations acting on the ground.

⁸² The latest case has been the Directive on Terrorism which succeeded to the 2002 Framework Decision on the same subject but whose impact has never been properly evaluated.

⁸³ Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection (OJ L 199, 31.7.2007, p. 23).

⁸⁴ Directive (EU) 2017/541 of 15 March 2017 on combating terrorism - OJ L 88, 31.3.2017, p. 6.

Furthermore, in several cases security related information could come from national police and intelligence sources and could not be easily shared, even though some basic instruments have been adopted (such as the PRUM Decisions and the so-called “Swedish Initiative” dealing with the access to national intelligence services.)

Even the European Agencies such as EUROPOL or FRONTEX, where almost all the Member States are represented (with a special status for DK, UK and IRL) and which have the task of monitoring the situation in the Member States, have been obliged to develop their system of collecting intelligence data in order better to understand the real scope of a problem or of a threat on the ground.

In order partially to overcome this lack of basic information, the EU institutions are also turning towards the collection of all the available data in the EU security related databases⁸⁵ created as implementing measures of EU legislation. This activity will be easier with the creation of a computerised central repository for reporting and statistics that will be hosted by eu-LISA.

This repository will contain anonymised data extracted from EURO-DAC, SIS, VIS and upcoming ETIAS and EES, which may also be used in the production of European migration statistics.

b) Disconnecting the different phases of the EU political cycle: strategy, legislation, and implementation

It is a matter of common sense that for a given public policy, strategy, legislation and implementation should be consistently linked and this may explain why after Lisbon the European Council has to “*define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice*” (Art. 68 TFEU).

However, this solution has proved to have several weaknesses.

First, the European Council has no legislative powers so that it is hardly acceptable for the European Parliament as co-legislator (with the Council) to be bound by the European Council’s conclusions. It would be wise for

⁸⁵ The declared aim is to grant their interoperability, even if each database has been established for its specific purposes which can only be modified by law and consistently with the principles of data protection. Needless to say, this approach has been strongly criticised by the European Data Protection supervisor as well as by civil society. A very critical observatory of all the interoperability-related measures has been established by Statewatch. See <http://www.statewatch.org/interoperability/eu-big-brother-database.htm>

the European Council to associate the European Parliament⁸⁶ with its deliberations, but this happened only with the “Stockholm Program”⁸⁷ adopted by the European Council immediately after the entry into force of the Lisbon Treaty and covering the period 2010-2014. On other occasions the European Parliament has submitted to the European Council some recommendations, notably dealing with the Anti-Drugs Strategy and the 2008 Pact on Migration, but no real dialogue ever took place with the result that the relationship between the two institutions is unsatisfactory. In some cases this lack of dialogue between the European Council and the European Parliament is surreal because it happens very often that the two major EU Institutions define diverging strategies on the same subject (see migration and asylum policies) and there is no way to bring them closer.

The second weakness is the fact that the European Council works by consensus and since the enlargement to 28 Member States this has become almost impossible given their differences in interests, size, administrative culture, and diverging political orientation. This may explain why the European Council has progressively lowered its ambitions in the FSJA domain, particularly in 2014⁸⁸ when it limited itself to the adoption of generic guidelines⁸⁹.

In a recent mid-term review of these guidelines (doc 15224/17 of 1 December 2017), the Council Presidency recognised, albeit in a diplomatic way, that “... *consistent transposition, effective implementation and consolidation were the overall priority for the area of freedom, security and justice.*”

⁸⁶ See the EP Resolution of 25 November 2009 on ‘the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme’ (OJ C 285 E, 21.10.2010, p. 12).

⁸⁷ See the text here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2010.115.01.0001.01.ENG.

⁸⁸ See: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2079%202014%20INIT#page=2>.

⁸⁹ According to these Guidelines: “*Building on the past programmes, the overall priority now is to consistently transpose, effectively implement and consolidate the legal instruments and policy measures in place. Intensifying operational cooperation while using the potential of Information and Communication Technologies’ innovations, enhancing the role of the different EU agencies and ensuring the strategic use of EU funds will be key. 4. In further developing the area of freedom, security and justice over the next years, it will be crucial to ensure the protection and promotion of fundamental rights, including data protection, whilst addressing security concerns, also in relations with third countries, and to adopt a strong EU General Data Protection framework by 2015*”.

However, it is fair to say that the quality of our legislation in this area and its consistent implementation demand more attention at both national and European level (...) Full use should be made of the tools provided by the Treaty, in particular Art. 70 TFEU which is not exploited to its full potential (...) Addressing implementation gaps through monitoring, evaluation and training would in turn influence in a positive manner the development of our legislation. In this endeavour, enhanced interaction with practitioners and legal professions should be encouraged as these communities are aware of practical difficulties on the ground. The operational role of EU agencies should be further developed, particularly as regards the European Asylum Support Office and the Fundamental Rights Agency (...) Data protection, conflict-of-law rules, protection of financial interests of the Union, rule of law issues dealt with in Justice and Home Affairs circles are linked to many other policy areas. Consistency and coherence are becoming major challenges and policy responses increasingly need to provide coherent solutions across various fields, which also need to be reflected in the EU's external policies (...) Finally, no serious attempt at codification seems to have taken place since 2014. We should at least consider how we could streamline our legislative corpus, the complexity of which greatly impairs its proper implementation (...) Establishing or improving links between policies, adjusting internal and external objectives, properly addressing fundamental ethical questions and generally thinking global is called for by the very nature and impact of technology. This 'new normal', challenging environment sets the scene for our collective action, as discussed in Tallinn on 29 September 2017 during the Digital Summit and at the October meeting of the European Council, which both set clear and ambitious objectives for the European Union.

Against this background, the Justice and Home Affairs communities need to review rather radically their way of approaching traditional, sovereignty issues such as territoriality, jurisdiction and norm setting. Recommendations were made to develop issue-based networks, in particular in the field of cyber security. The responsibilities of private entities and the way the EU interacts with them need to be addressed. Finally, capacity-building, funding and training for practitioners and legal professions need to be drastically increased so that they engage positively in the digital transformation ...".

All these are sensible ideas but it is not self evident that the European Council has taken them in account for the revision of the guidelines scheduled for mid-2019, which quite likely will be adopted during the electoral period thereby excluding the possibility for the European Parliament or civil society to play a part in this exercise.

In theory, preparatory work could be done by the Commission, which according to Article 17 of the EU Treaty should be at the origin of EU Strategies, but if relations between the European Council and the European Parliament are unsatisfactory, the former's relations with the Commission are not much better. Since the appointment of an European Council President, relations with the President of the Commission (who is also member of the European Council) are not always easy and this may explain why the Commission builds its own strategic role by adopting its own political "agendas" covering the main domains of the FSJA, borders, migration, internal security, criminal law, etc.

The lack of real dialogue between the EU institutions on the FSJA problems could also have a severe impact on legislative activity, where some basic concepts, such as the notion of "threat" to be taken in account at EU level still have to be defined or are vaguely called into question by the EU legislation (see the case of the recent EU Directives on EUROSUR, on PNR and on terrorism as well as the case where a threat justifies the temporary re-establishment of internal border controls in the Schengen area).

For instance, the Council of the EU set the priorities for the fight against serious and organised crime for the second full Policy Cycle from 2018 to 2021 in May 2017⁹⁰ and asked Europol in cooperation with Member States and relevant EU agencies⁹¹, to prepare in the course of 2019 a mid-term review of new, changing or emerging threats. According to a Europol internal preparatory document, the developments set out in the Mid-Term Review will be used as input for the development and implementation of the EU crime priorities as set out by the Council in May 2017. This input may be used by the Council at strategic level to re-adjust priority setting and/or at operational level to guide operational focus and activities within individual EU crime priorities. The little detail is that the Mid-Term Review 2019 will be classified as RESTREINT UE/EU RESTRICTED which means that it will not be publicly debated by the European Parliament or by the national Parliaments.

In order to solve these ambiguities and promote sound EU legislation

⁹⁰ Council conclusions 9450/17 on setting the EU's priorities for the fight against organised and serious international crime between 2018 and 2021 - Council conclusions (18 May 2017).

⁹¹ Europol will work with Member States and the relevant EU Agencies to prepare the Mid-Term Review. All Member States, EASO, EMCDDA, EUIPO, EU-LISA, Eurojust, Frontex, and OLAF are concerned.

defining when and how an alert system should be triggered so as to justify EU intervention, it would have been wise to analyse the existing cross-border threats, update the pre-Lisbon *acquis* in police and judicial cooperation in criminal matters and frame a binding framework for police cooperation. Only recently, in order to foster mutual trust between police forces in and between the EU Member States, the Commission has proposed some interoperability measures based on Article 87(2) TFEU dealing with “(a) the collection, storage, processing, analysis and exchange of relevant information; (b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection; (c) common investigative techniques in relation to the detection of serious forms of organised crime”.

Notwithstanding the 2014 European Council Guidelines and a formal EP request, a general evaluation has never been made by the European Commission, not even after the end of the five years transitional phase foreseen by Protocol 36 to the Treaty in 2014.

A worrying confusion of roles and responsibilities between the EU institutions persists also in sensitive domains such as the fight against terrorists. In this area, different players are deemed to interact at EU level such as the Ministers of Interior, the anti-terrorism coordinator, the Committee for Internal Security (COSI provided for in Art. 71 TFEU) three members of the Commission (namely Vice President Timmermans, the Home and Migration Commissioner Avramopoulos and the Commissioner for security King), EU Agencies such as Europol, Eurojust and, in a foreseeable future, also the European Public Prosecutor (see Art. 86 TFEU).

What is even more appalling is the persistent confusion which reigns at implementing and executive level between the Commission, the Council and the Member States themselves.

Similarly, when discussing operational cooperation and executive functions, EU Member States want closer control through their “experts” in the case of delegated powers (Art. 290 TFEU) as well as when executive action should be taken via the so-called ‘comitology’ framework (Art. 291 TFEU). In both cases, the representatives of EU Member States want keep a check on how the European Commission implements EU law and to check on each other.

The outcome of these ambiguities is permanent bickering about power between the three institutions and the Member States’ administrations, even if several versions of interinstitutional agreements have been negotiated on “better law-making” to frame the principle of “sincere cooperation” enshrined in Articles 4(4) and 13 TEU.

c) Circumventing the co-decision procedure and parliamentary input through the choice of CFSP as a legal basis or other “creative” alternatives

A third worrying device used by the Member States to avoid the control and participation of the European Parliament and the Commission and to preserve the intergovernmental method in FSJA policies has been to merge them with the common security and defence policies, which do not require the association of the European Parliament nor the full jurisdiction of the Court of Justice.

This happened notwithstanding the clear “mutual respect” set out in Article 40 TEU, according to which “*The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union*”. Surprisingly, this overlapping of external with internal competences has been endorsed by the Court of Justice, which has accepted the coexistence for the same measure of two legal bases dealing, respectively, with internal and external policies⁹².

The obvious outcome of this approach is therefore that these new EU measures remain of a diplomatic non-binding nature even if they deal, for instance, with irregular migration.

This is notably the case with EU Operation EUNAVFOR Sophia, which claims to be grounded on a United Nations Security Council Resolution but whose substantive scope is to fight trafficking, smuggling and irregular migration in the Mediterranean, so that the appropriate legal basis should have been Articles 77 and 79 TFEU on fighting irregular migration, which requires co-decision, namely the ordinary legislative procedure, and a qualified majority vote in the Council.

d) Empowering the EU agencies, which are creatures of the Member States, to exercise both executive and political functions

To overcome the control of the Commission, the EU Member States have

⁹² See notably the judgment of 24 June 2014 in *Parliament v Council* (C-658/11, EU:C:2014:2025) on the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer (OJ 2011 L 254, p. 1) and Case C-263/14, *European Parliament v Council* on the Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the United Republic of Tanzania.

strengthened their control over the Freedom Security and Justice policies through the old and new EU agencies, which are often turning into pre-federal structures of some kind⁹³ whereby each Member State can check on the others and which are also developing a pre-regulatory role. The Court of Justice with the ESMA ruling, which de facto changed the institutional balance in the EU, has boosted this agencification trend notably in the FSJA.

The pivotal role played by Frontex in the new EU Integrated Border Management as framed by Regulation EU No 2016/1624 on the European Border and Coast Guard is the most blatant example of how the EU Member States through a EU Agency are not only exercising operational functions, but also defining the EU strategy in this sphere. In principle, the common Strategy to be adopted by the Management Board (Arts 3 and 4 of the Regulation) is “technical” but, in the absence of an overarching strategy adopted by the EU institutions, it will be the only meaningful strategic document in this domain. But can this situation be considered acceptable from a democratic point of view. Can a EU agency define and, at the same time, implement an overarching political objective of the Treaty?

Even the recent seminal European Court of Justice case-law on the ESMA Short selling case, Case C-270/12 in which the Court approved the possibility of EU institutions delegating powers to issue measures of general application to a EU agency, it was only in cases in which there is no political discretion, as is clearly the case with an integrated strategy⁹⁴.

4. Conclusions and possible improvements in the new legislature (2019-2024).

From the description in the previous sections it appears that, notwithstanding the improvements in the Lisbon Treaty and in the EU Charter,

⁹³ These agencies are the Fundamental Rights Agency (FRA), FRONTEX dealing with border policy, EASO dealing with Asylum, EUROPOL dealing with Police Cooperation, CEPOL as a training institute, EUROJUST for judicial cooperation, EU-LISA for the management of the large information systems, and EMCDDA dealing with prevention of drug abuse

⁹⁴ This is still the main lesson arising from the “Meroni” doctrine which requires the preservation of the rule of law and of the principle of democracy in the EU. Even if it is true that, in the post-Lisbon Treaty, reference is made to EU agencies in several articles and if it is possible to challenge their acts before the Court (see Art. 263 TFEU), the main institutions’ responsibilities remain untouched.

the EU Member States are dragging their feet in the transformation of the EU into an FSJA. The lack of a true strategic dimension is probably due to the fact that several Member States do not accept EU priorities which may conflict with their own internal priorities in politically sensitive areas such as migration, asylum and internal security policies.

In this context, the EU's transition to a more proactive and incisive role in these sensitive areas by sharing the sovereignty with the Member States has also triggered a counter-reaction notably in the case of the United Kingdom, whose citizens first and then the National Parliament have decided to leave the EU. Without making the same extreme choice, other Member States have also showed their unwillingness to implement some essential EU measures in the borders, migration and asylum domains by challenging the solidarity principle which should govern these policies (Art. 80 TFEU). Thus is the case with some of the 13 new EU members who joined the Union in 2004, 2007 and 2013 and in particular of the countries of the so-called Visegrad Group (Poland, Hungary, Czech Republic and Slovakia) and in the Baltic Region.

But, more worryingly, some founding Member States, such as the Netherlands and Germany, under the pressure of an increasingly sceptical national public opinion, have also shown growing resistance to a bolder EU role in the new domains of the FSJA.

This can explain why since the entry into force of the Treaty most of its provisions have not been implemented and the balance of power between citizens and EU institutions remains as it was before the Treaty and the democratic deficit has even been worsened. In some cases, the Member States have created parallel mechanisms and structures to reach objectives that should have been reached within the Treaties.

The paradoxical consequence has been that, in order to avoid a strong confrontation with the Member States, the latest European Council and Council strategies as well as the Commission complementary documents on the same subjects have become more a compilation of disparate measures taken in the same field than a consistent toolbox of measures designed to address well-known external or internal threats.

The common feature of most of these FSJA "strategies" is still that not only do they mirror the Member States' requests but they are also still flawed from a democratic point of view, as they do not take into account the role of the European Parliament and preserve some ambiguities as to the roles to be played by the Council, the Member States and the Commission.

As regards Internal Security, for instance, after 9/11 the EU tried to

mirror the US Homeland security policy and the European Commission has been inspired since 2002 by the new-born US Homeland Security Department. This may explain why the EU has mirrored US measures such as the US Visit and ESTA with the EU version of VIS and ESTA, the US biometric Passport or the external Border Strategic Control (EUROSUR) and even the US PNR initiative with a corresponding EU PNR framework.

However, the constitutional differences between the EU and the USA are obvious and the European Council has gradually lowered its ambitions, notably in 2014, when it limited itself to the adoption of generic guidelines evoking the necessity to implement and evaluate what was previously decided⁹⁵.

In such an unbalanced and contradictory framework is not easy to say what can be done to re-launch the initial ambition as set forth in the 1999 Tampere conclusions.

Some possible improvements to be taken in account in 2019 when updating the European Council guidelines for the new legislature 2019-2024 could be the following.

1. Making more explicit the link between the EU's founding values (Art. 2 TEU) and the EU's missions (Art. 3 TEU), notably in the context of the FSJA, by establishing a permanent monitoring mechanism, even before triggering the Article 7(1) procedure in all the Member States as recently suggested by the European Parliament and the Commission.

2. Establishing a transparent dialogue between the European Council and the European Parliament on the priorities to be implemented at legislative, financial and operational level in the FSJA by taking in account the shortcomings of the EU measures in the previous legislature.

Promoting at national level complementary policies collecting and comparing similar data by establishing clear figures for the general financial impact of the implementation of the common EU policies provided for in Title V TFEU.

⁹⁵ Needless to say, such a general assessment has not yet been made, not even after the end of the transitional period of five years following the entry into force of the Lisbon Treaty for the measures previously adopted in the area of judicial and police cooperation in criminal matters.

3. *Establishing in each main EU common policy (borders, asylum, migration and police and judicial cooperation in criminal matters) specific legislation framing an EU-wide strategy with clear assessment of priorities, solidarity mechanisms and operational intervention as well as a clear link with national strategies in the same fields.*

4. *Unblocking the EU legislative proposals dealing with the rights of the citizens in the FSJA (further procedural rights in criminal law, fighting discrimination, promoting transparency, and strengthening the principles of good administration and of accountability of the EU Agencies acting in these fields).*

5. *Assessing the compatibility with the EU Charter and the post-Lisbon CJEU jurisprudence for third-pillar measures adopted before Lisbon, which are still into force. Establishing a general independent evaluation mechanism of FSJA policies as required by Article 70 TFEU complementing the specific evaluation mechanism established for each EU binding measure.*

6. *Developing a consistent wide ranging policy for human mobility and regular migration by adopting an EU Migration Code dealing with skilled migrants, single permits, seasonal workers, researchers, ...*

7. *Overcoming the Dublin Regime by empowering EASO with the treatment of asylum requests for all the EU. De-criminalising humanitarian protection for people in need.*

8. *Widening the competencies of the European Public Prosecutor to cover the fight against terrorism and serious crime (as provided for in Art. 86 TFEU) by creating a specific section competent for criminal law in the CJEU. Adopting a new legal framework for freezing the assets of terrorists (Art. 75 TFEU)*